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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718, *Petitioner*,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., et al., *Respondents*.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC., *Petitioner*,
v.
PEDRO CASTRO, et al., *Respondents*.

NANCY B. BEECHER, et al., *Petitioners*,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., et al., *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE FOR LEAGUE OF UNITED LATIN AMERICAN CITIZENS, HISPANIC NATIONAL BAR ASSOCIATION, THE EQUAL JUSTICE FOUNDATION, INC., LATINO POLICE OFFICERS ASSOCIATION, LATINOS FOR AFFIRMATIVE ACTION, LOS ANGELES CITY EMPLOYEES CHICANO ASSOCIATION

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QUESTIONS PRESENTED

1. Did the District Court Exceed Its Equitable Powers in Fashioning the Relief Ordered in the Judgment Below?

2. Is the Race-Conscious Relief Ordered by the District Court Constitutionally Permissible?

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INTEREST OF AMICI CURIAE

The League of United Latin American Citizens (LULAC) is a national civil rights organization with social and cultural functions. For over 50 years LULAC has advocated equal employment opportunities for Hispanics and developed job opportunities for Hispanics through its activities.

The Hispanic National Bar Association is a national organization of lawyers of Hispanic heritage and other lawyers interested in the unique problems faced by Hispanics in the United States. For over ten years it has advocated for equal employment opportunities for Hispanics in professional and non-professional capacities. The Association has presented its views to the Courts of the United States regarding employment issues of vital importance to Hispanics.

The Equal Justice Foundation, Inc. is a national public interest organization with a membership of over one thousand lawyers and students. The organization's purpose is to improve citizen access to justice. The numerous

chapters throughout the United States create greater access for the underrepresented through legislative work and program development/implementation.

The Latino Police Officers Association is a statewide non-profit organization of Latinos employed in police work, parole, probation and law enforcement. With 12 chapters throughout the State of California, the association's activities includes the recruitment, maintenance and promotion of Latinos within law enforcement.

Latinos for Affirmative Action is a coalition of Hispanic organizations and individuals dedicated to pursuing equal employment opportunity in City and County of San Francisco jobs for Hispanics. L.A.A. has pursued administrative avenues to alter the selection and hiring process used by San Francisco in order to correct the historic and pervasive underrepresentation of the Hispanic population of San Francisco in the City's workforce.

The Los Angeles City Employees Chicano Association, Inc. (LACECA) is an

organization of Spanish surnamed city employees concerned with ethnic discrimination or systematic exclusion of Hispanics from municipal employment. Since 1971, LACECA has worked to advance the employment, educational, economic, and social welfare of its members and to promote and support affirmative action within the City of Los Angeles' workforce.

Each of the amici has deep concern that, as a result of strict application of seniority rules, retrenchment in municipal, county, and state workforces might undermine fragile and recently won gains in employment of Hispanics in governmental public service agencies. Such gains are critical to minority citizens who depend upon those agencies for public services.

QUESTIONS PRESENTED

1. Did the District Court Exceed Its Equitable Powers in Fashioning the Relief Ordered in the Judgment Below?

2. Is the Race-Conscious Relief Ordered by the District Court Constitutionally Permissible?

STATEMENT OF THE CASE

Amici rely upon Respondents to set out the factual setting of this case.

SUMMARY OF ARGUMENT

Amici curiae respectfully urge that the decision below be affirmed. The broad power of the district court in fashioning relief in an employment discrimination case includes the use of factors other than strict seniority to effectuate layoffs where the overall goals of a consent decree will be undermined by seniority- based layoffs. Consequently, the Court correctly ordered affirmative action in the lay-off process to overcome the discrimination found to exist and to be remedied in the consent decree.

The first question presented in this case is whether the district court exceeded its equitable powers in fashioning the relief in this case. Amici agree with the district court, the First Circuit Court of Appeals, and Respondents herein, that federal courts have well recognized broad powers to fashion remedies to end discriminatory

conduct on the part of public entities, especially where a consent decree has already been entered in the case. Federal courts are under a duty to order relief which will not only prohibit future discriminatory conduct but also eradicate the present effects of past discrimination.

The second question presented herein is whether or not the race-conscious relief ordered by the district court is constitutionally permissible. Amici respectfully submit that federal courts have firmly established the use of race as a factor in fashioning and securing relief in discrimination cases. All counsel for parties in this case have consented to the filing of this brief amicus curiae.

ARGUMENT

I.
THE DISTRICT COURT DID NOT EXCEED ITS EQUITABLE POWERS IN FASHIONING THE RELIEF BELOW

A. Hispanics Have Been Significantly Underrepresented In Public Safety Agencies.

The First Circuit Court of Appeals, in its opinion below, characterized its decision as a balance of two competing rights, earned seniority versus racially representative police and fire departments. The Court emphasized the need for the public safety departments of a city to reflect its minority population in order to deliver effective service. The Court reasoned that "the public interest requires a racially balanced police force ... Unless the public safety departments reflect its growing minority population, there is bound to be antagonism, hostility and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it most." Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 977 (1st Cir. 1982) (citation omitted).

Petitioners contend that the Court's justification that a racially balanced public safety department is necessary to provide effective services must be discredited because that justification accepts that public racial perceptions may dictate public agency staffing policies. (Brief for Petitioner Boston Firefighters Union, Local 718 at p. 12) However, the Court's decision was not based on the public's preference, but on the public interest in having racial diversity in police and fire protection forces.

In 1972, Congress recognized the impact that a pattern and practice of discrimination by an employer -- particularly a public employer -- may have on a class of persons. In recommending extension of Title VII to cover State and municipal employment, the Senate Labor Committee specifically cited statistical findings, revealing that "in the five Southwestern states with the highest concentration of Spanish-speaking Americans, their representation in the vital area of law enforcement is significantly

disproportionate to their demographic distribution." Legislative History of the Equal Employment Opportunity Act of 1972, Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., p. 419 (1972).

It then said:

> This failure of State and local government agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. The importance of equal opportunity in these agencies is, therefore, self-evident. In our democratic society, participatory government is a cornerstone to good government. Discrimination by government therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates a mistrust, alienation, and all too often hostility toward the entire process of government.

Echoing similar sentiments, the House Committee on Education and Labor cited the same statistical findings and found:

> The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all of the people equally is negated.
>
> This widespread discrimination is evidence that state and local government units have not instituted equal employment opportunity required by the national policy to eliminate discrimination in employment. Id. at 77.

The underrepresentation of Hispanics in the nation's municipal public safety agencies is severe and there has been minimal improvement since Title VII became applicable to public employers in 1972. As early as 1969 the U.S. Commission on Civil Rights stated, in their review of state and local government employers, that "[b]arriers

and obstacles to equal employment opportunity for minority group members were greater among uniformed policemen and firemen than in any other area of state and local government." 1/ The Commission found that "[i]n the protective services...Spanish Americans were employed as policemen and firemen in San Francisco, Oakland and Houston on the average less than half as frequently as Anglos." 2/

In 1974 Spanish-surnamed Americans were only 1.9% of the firefighters in the United States while whites comprised

1/ U.S. Commission on Civil Rights, For ALL the People, A Report on Equal Opportunity in State and Local Government Employment (1969), p. 71.

2/ Id. at p. 26-27. Hispanics were severely underemployed in the three municipalities surveyed when compared to their representation in the population in those areas:

Spanish American Population (%)

San Francisco	Oakland	Houston
7.0	6.5	6.8

Police force - Spanish Americans (%)

San Francisco	Oakland	Houston
1.2	0.6	6.4

Firefighter force-Spanish Americans (%)

San Francisco	Oakland	Houston
1.5	1.1	2.0

Id. at p. 25

93.5% of the total firefighter services. Similarly, Spanish-surnamed Americans were 2.5% of the nation's police forces as compared to whites' 88.9% share of the total force that same year. 3/ By 1978 the Hispanic representation in our nation's safety agencies had increased by less than 1%: Hispanics comprised 2.6% of the nation's firefighters (compared to whites' 91% representation) and 3.3% of the nation's municipal police forces (compared to 87% white representation). 4/ Hispanics have not achieved equitable representation in our nation's public safety agencies. The gains in Hispanic participation have been extremely slow and do not nearly reflect the increase in the Hispanic

3/ Equal Employment Opportunity Commission, Minorities and Women in State and Local Governments 1974, Vol. IV - Municipal Governments, Research Report No. 52-4 (1977) pp. 48, 59.

4/ Equal Employment Opportunity Commission, Equal Employment Opportunity Report - 1978, Minorities and Women in State and Local Government, (1980), pp. 381, 384.

population in the United States. [5/]

Because of shrinking governmental revenues and rising costs, many state and local employers are now, or soon will be, engaged in substantial reductions in workforce. If strict seniority -- "last hired, first fired"-- is followed in all cases, the layoff of police and fire protection personnel, when coupled with the comparatively recent hiring of Hispanics into these job categories, would have a devastating impact on the racial and ethnic integration of police and fire departments throughout the United States. If this impact is allowed to occur, many public agencies' workforces would return to the levels of minority participation that existed in the early 1970s, at the end of decades of overt discrimination and benign neglect.

5/ The nation's Hispanic population increased to 14.6 million in 1980 and now accounts for 6.4 percent of the population, up from 4.5 percent in 1970. U.S. Bureau of the Census, 1982.

1. There Is A Need For Hispanics To Serve In Public Service Agencies To Ensure Equitable Provision Of Services To Minorities.

It has been long recognized that an integrated work force results in improved public service. In a 1969 report on equal employment opportunity in state and local government the U.S. Commission on Civil Rights concluded:

> The civil servant performs government's routine chores and housekeeping duties and makes the many policy and administrative decisions which have a concrete and often immediate effect on the lives of the people living within the particular jurisdiction. If these decisions are to be responsive to the needs and desires of the people, then it is essential that those making them be truly representative of all segments of the population. 6/

6/ U.S. Commission on Civil Rights, For ALL the People, A Report on Equal Opportunity in State and Local Government Employment (1969), p. 131.

In Confronting Racial Isolation in Miami (1982), the Commission maintained its position that "[a] representative [police] force enjoys improved relations with its community, gains its respect and trust and consequently functions more effectively." 7/

7/ Id. at 334. See also, U.S. Commission on Civil Rights, Who is Guarding the Guardians: A Report on Police Practices (1981), p. 5; Police Practices and the Preservation of Civil Rights (1980), pp. 10-11; Mexican Americans and the Administration of Justice in the Southwest (1970), p. 17; Law Enforcement: A Report on Equal Protection in the South (1965), p. 93; Alabama Advisory Committee, Where Are Women and Blacks? Patterns of Employment in Alabama Government (1979), p. 17; Kansas Advisory Committee, Police-Community Relations in the City of Wichita and Sedgwick County (1980), p. 69; Washington Advisory Committee, Equal Employment Opportunity in Tacoma Area Local Government (1980), p. 40; Florida Advisory Committee, Toward Police/Community Detente in Jacksonville, (1975), p. 10; Florida Advisory Committee, Police by the White Male Minority (1976), pp. 72-73; South Dakota Advisory Committee, Liberty and Justice for All (1977), p. 37; Tennessee Advisory Committee, Civic Crisis -- Civic Challenge: Police Community Relations in Memphis (1978), p. 27; Florida Advisory Committee, The Administration of Justice in Pensacola and Escambia County, (1981), p. 17.

Several courts have relied on the community-wide benefits of an integrated police force to justify race-conscious relief. In Detroit Police Officers Ass'n v. Young, 608 F. 2d 671, 696 (6th Cir. 1979), cert. denied 452 U.S. 938 (1980) the Sixth Circuit explained:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is ... on the public's perception of law enforcement officials and institutions.

See also Talbert v. City of Richmond, 648 F. 2d 925, 931 (4th Cir. 1981).

Moreover, in the case of the Hispanic community there is an urgent need for bilingual police and firefighters. The vast majority of Hispanics in this country are Spanish-

speaking. 8/ The Spanish language is critical to the overwhelming majority of Hispanics in the United States as a primary means of communication. Spanish language ability is crucial if police or firefighters are to communicate in an emergency situation with members of the Hispanic community. The exclusion of Hispanics from our public service agencies has resulted in unequal services to the Hispanic community. 9/

8/ A 1978 Bureau of Census report indicates that only 14.3% of Hispanics in the United States have an English language background. U.S. Department of Commerce, Bureau of the Census, Persons of Spanish Origin in the United States: March, 1978, Current Population Reports, Series P-20, No. 339, 1979. Spanish is the first language for most Hispanics in the United States.

9/ Brown, Susan; Estrada, Carmen; Hill, Ann, The State of Hispanic America, "Hispanics & the Administration of Justice" (National Hispanic Center for Advanced Studies & Policy Analyses, 1981), pp. 98, 100, 101.

B. The Courts Have Broad Equitable Powers To Fashion Remedies To Correct Pervasive Discrimination In Employment In The Public Sector.

1. Equity Permits Courts Flexibility In Formulating Relief To Correct Constitutional And Statutory Violations.

It is an unassailable principle of federal adjudication that federal courts have broad equitable powers to fashion remedies to correct constitutional or civil rights violations. See generally, Brown v. Board of Education, 349 U.S. 294, 300 (1955); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971); Albemarle Paper Company v. Moody, 422 U.S. 405, 417-418 (1975); Hills v. Gautreaux, 425 U.S. 284, 294-295 (1976). In exercising this power, courts have the duty not only to terminate ongoing practices of discrimination, but also to eliminate the effects of past discrimination. Louisiana v United States, 380 U.S. 145, 154 (1965).

The breadth of equity power of federal courts is exemplified by the relief ordered and affirmed in a variety of cases involving constitutional and

statutory violations. In Hutto v. Finney, 437 U.S. 688-689 (1978) this Court affirmed the actions of the district court which had issued an order that placed limits on the number of men that could be confined in a single prison cell, required that each cell have a bunk, and set 30-day limits on "isolation" sentences. The remedy fashioned by the district court was upheld even though it intruded on the conduct and administration of prison affairs by prison officials. Cf. Procunier v. Martinez, 416 U.S. 396, 404-405 (1974).

Similarly, in Newman v. State of Alabama, 503 F.2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975), the Fifth Circuit upheld an order of the district court which required extensive reorganization and upgrading of medical care provided in the Alabama state prison system. Newman v. Alabama, supra, 503 F.2d at 1325. In Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) a lower court order requiring the implementation of a detailed set of standards for the provision of treatment

and rehabilitation at three state facilities for the mentally handicapped was upheld.

Federal courts have also ordered broad relief in cases involving conditions of confinement and constitutional rights in the field of institutions for the detention of juveniles. Velson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1973), aff'd 491 F.2d 352 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974).

In each of the cases detailed above the Court of Appeals or this Court upheld the relief ordered by the district court -- relief far more intrusive than that in the case at bar -- despite challenges by the respective government officials that the orders in question intruded into areas traditionally within the decision-making sphere of State and local officials. However, in each instance the appellate courts found that the constitutional violations required correction and that the courts possessed the authority to order relief which would in fact correct the violation found to exist.

More directly related to the instant case are decisions by this Court affirming the exercise of equity powers to remedy racial discrimination. The broad scope of a district court's discretion in fashioning a remedy in a voting rights case has been upheld this Term in City of Port Arthur v. United-States, ___ U.S. ___, 51 U.S.L.W. 4033 (1983). City of Port Arthur, supra, was a Section 5 suit seeking approval of changes in the voting scheme for election of the city council and the office of mayor. The District Court disapproved the plan submitted by the City, and approved by the Attorney General, on the basis that annexation of a predominantly white unincorporated area, coupled with expansion of the city council, would impermissibly dilute the voting strength of the Black minority population of the City. The District Court imposed its own plan. Thereafter the City appealed. In upholding the action of the district court, this Court held that deference should be paid to the district court, which was sitting in equity and which was seeking to remedy a situation which

would constitute a violation of law. City of Port Arthur v. United States, supra, 51 U.S.L.W. at 4035.

Earlier, in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), this Court affirmed a wide-ranging plan for desegregating the public schools of Charlotte and surrounding Mecklenburg County, North Carolina. Premised on the landmark decision in Brown v. Board of Education, 347 U.S. 483 (1954), declaring racially segregated schools unconstitutional, the Swann decision upheld a plan altering school attendance zones, instituting a transfer program and requiring transportation to support it, and requiring busing of students toward the goal of creating a "unitary system in which racial discrimination would be eliminated root and branch." Swann v. Charlotte-Mecklenburg, supra, at 15, citing Green v. County School Board, 391 U.S. 430, 437-438 (1968). See also generally, Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Griffin v. County School Board, 377 U.S. 218 (1964). This Court has also held

that a metropolitan remedy is not impermissible as a matter of law to correct governmental action resulting in racial housing discrimination. Hills v. Gautreaux, 425 U.S. 284, 306 (1976).

This Court's approval of relief designed to end race and national origin discrimination has not been limited to discrimination in voting, education or housing. This Court's decisions have upheld the power of district courts to award back pay, Albemarle Paper Company v. Moody, 422 U.S. 405, 417-418 (1975) and constructive seniority, Franks v. Bowman, 424 U.S. 747 (1976) to correct employment discrimination. Additionally, numerous Appeals courts have considered and approved the use of accelerated hiring goals to eradicate the effects of past employment discrimination. 10/

10/ Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F. 2d 622 (2nd Cir. 1974)(Title VII); United States v. Masonry Contractors Ass'n of Memphis, Inc., 497 F. 2d 871 (6th Cir. 1974)(Title VII); Franks v. Bowman Transp. Co., 495 F. 2d 398 (5th Cir. 1974), modified, 424 U.S. 747 (1976) (Title VII); Morrow v. Crisler, 491 F. 2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974)(§1983); Vulcan Society v. Civil Ser. Comm'n, 490

The relief ordered and approved in the cases cited and discussed above is consistent with the flexibility inherent in the invocation and exercise of the equity powers of federal courts. As was stated in Hecht v. Bowles, 321 U.S. 321 (1944):

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and

10/ (continued)
F. 2d 387 (2nd Cir. 1973)(§1983); Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F. 2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974) (Title VII); Bridgeport Guardians, Inc., v. Civil Serv. Comm'n, 482 F. 2d 1333 (2nd Cir. 1973)(§§ 1981, 1983); United States v. N.L. Indus., Inc, 479 F. 2d 354 (8th Cir. 1973) (en banc)(§ 1983); Pennsylvania v. O'Neill, 473 F. 2d 1029 (3rd Cir. 1973) (en banc)(§ 1983); United States v. Local 212, IBEW, 472 F. 2d 634 (6th Cir. 1973)(Title VII); United States v. Wood Lathers Local 46, 471 F. 2d 408 (2nd Cir.), cert. denied, 412 U.S. 939 (1973)(Title VII); United States v. Carpenters Local 169, 457 F. 2d 210 (7th Cir.), cert. denied, 409 U.S. 851, (1972)(Title VII); Carter v. Gallagher, 452 F. 2d 315 (8th Cir.

> practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. 321 U.S. at 329-330.

Petitioners in the instant case seek to deprive the courts, in the important context of seniority-based layoffs, of any discretion to utilize equity's breadth and flexibility to adjust the public interest, private needs, and competing private claims.

Concomitant with the broad powers granted to federal courts is the duty in cases involving racial

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10/ (continued)
1971) (en banc), cert. denied, 406 U.S. 950, (1972)(§ 1983); United States v. Ironworkers Local 86, 443 F. 2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971)(Title VII); Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F. 2d 159 (3rd Cir.), cert. denied, 404 U.S. 854 (1971)(Title VII); United States v. Local 38, IBEW, 428 F. 2d 144 (6th Cir.), cert. denied, 400 U.S. 943, (1970)(Title VII); Local 53, Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. 1969)(Title VII).

discrimination to exercise that power in such a way as to eliminate the discrimination found to exist. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); Hills v. Gautreaux, 425 U.S. 284, 294-295 (1976).

As has been stated by this Court:

> [W]here racial discrimination is concerned, the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. (emphasis added) Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), citing Louisiana v. United States, 380 U.S. 145, 154 (1965).

This district court understood this responsibility and fashioned a remedy which was designed to bar future discrimination in the police and firefighter positions, as well as to correct the historic racial imbalance that had existed in the job categories.

C. The Remedy Proposed by The District Court And Affirmed By The Court Of Appeals Is A Narrowly Drawn Program To Ensure Attainment Of An Important And Permissible Goal: The Need to Protect Remedial Orders Designed To Grant Relief From Past Discrimination.

The district court's order in this case was necessary to protect the court's pre-existing orders desegregating the public safety departments. After proof of illegal discrimination, federal courts have the authority to order complete relief as discussed above. The district court sought to eliminate the discriminatory effects of the past as well as bar like discrimination in the future through the orders challenged here. The orders were proposed following judicial findings of illegal discrimination and sought to eliminate discrimination by mandating hiring goals and ratios. Castro v. Beecher, 459 F.2d at 736-37, n. 15. Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1026-1027 (1st Cir. 1974). Those orders are totally consonant

with decisions in virtually every Circuit Court of Appeals requiring hiring goals and affirmative action to remedy employment discrimination. Confronted by a reduction in force that would have destroyed past progress under its decrees and would cripple future efforts to achieve the desired objectives, both the district and the Court of Appeals recognized the need to protect the original decrees through modification of the planned layoff system.

This case does not involve the adoption or application of seniority systems that do not have their origin in intentional discrimination and are therefore protected by § 703(h) of Title VII. Had Hispanic and Black police and firefighters sued for suspension of the layoff plan in an independent court action, they most likely would have lost. International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977). However,

Section 703(h) does not limit the equitable powers of the courts to extend remedial relief under Section 706(j) of the Act, once discrimination has been found. Franks v. Bowman Transportation Co., 424 U.S. 747, 758 (1976). This case involves the district court's use of these equitable powers and not the issue of seniority discrimination. The district court issued a narrow, limited decree designed to protect the status quo of existing court orders.

The interests that were balanced by the district court -- elimination of the effects of past discrimination versus forced reductions in the workforces -- are not unique to this case. There are literally hundreds of judgments, consent decrees, or litigation induced affirmative action plans that would be undone by seniority based layoffs. To rule for petitioners in this case would deprive federal courts of the

equitable power to preserve remedies in appropriate cases, or indeed to consider any factors other than seniority. Such a ruling would cripple voluntary efforts by employers to negotiate or devise layoff plans based on factors other than, or in addition to, seniority, in order to meet permissible goals such as insuring minority access to public services or preserving minority employment in traditionally segregated job categories. Cf. United Steelworkers ofAmerica v. Weber, 443 U.S. 193 (1979); Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

II.
THE RACE CONSCIOUS RELIEF ORDERED BY THE DISTRICT COURT IS CONSTITUTIONALLY PERMISSIBLE

The original relief ordered by the court below is a race conscious program designed to ensure that historic discrimination in the Boston Fire and Police Departments is ended. The

supplemental order of the district court that is the basis of the instant appeal is likewise a race conscious plan designed to ensure that the progress made toward eliminating the effects of past discrimination is preserved. The order of the district court conforms to, and is consistent with, earlier decisions of this Court which have validated the consideration of race in local public works project contracting, Fullilove v. Klutznick, 448 U.S. 448 (1980); graduate school admissions, Regents of the University of California v. Bakke, 438 U.S. 265 (1978); affirmative action job training programs, United Steelworkers of America, v. Weber, 443 U.S. 193 (1979); and decennial reapportionment, United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

This Court's decision in United Steelworkers of America v. Weber, 443 U.S. 193 (1979),

is most pertinent to the instant case. In Weber this Court found that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended, does not bar voluntary, private affirmative action undertaken by an employer in collaboration with an employee organization. The significance of the Weber case is that, similar to the relief ordered by the district court below, the affirmative action plan in Weber was part of a program that included a preference for Blacks for a specific number of slots in a job training program and was directed toward ending "conspicuous racial imbalance in traditionally segregated job categories." United Steelworkers of America v. Weber, supra, at 208-209. By analogy the relief ordered by the court below mandates the use of race as a criterion for a percentage of the positions in the Boston Police and Fire Departments toward the end of

ensuring that racial imbalances in historically segregated job categories, found to be the product of discrimination, did not continue or increase.

The arguments in favor of the relief ordered by the court below are stronger than for the program approved in Weber. In the instant case there had been a finding by the district court and upheld by the Court of Appeals that discrimination was a part of the selection process for positions with both the Police and Fire Departments. 11/ The previous findings of discrimination provide a solid basis for the affirmative relief ordered by the district court. Cf. Fullilove v. Klutznick 448 U.S. 448, 455 (1980); Detroit

11/ Boston Chapter, NAACP v. Beecher, 479 F.2d 967-969 citing, Castro v. Beecher, 334 F.Supp. 930, 934, (D. Mass. 1971), aff'd; Castro v. Beecher, 459 F.2d 725, 730-31, 737-738 (1st Cir. 1972); Boston Chapter, NAACP, Inc. v. Beecher, 371 F.Supp. 507, 510, 514, 517, 519-20; aff'd, 504 F.2d 1017 (1st Cir. 1974).

Police Officers Ass'n v. Young, 608 F.2d at 689; Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981). See also Franks v. Bowman, 424 U.S. 747 (1976); International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Additionally, the relief ordered by the district court is consistent with the Weber decision because it is not an absolute bar to the advancement within the Police and Fire Departments by white officers. Weber, supra, at 208. The lower court's order in this case did not require that the proportion of minority police and fire officers be consistent with the minority representation in the general population. Rather, the order left the proportion of Black and Hispanic police and fire officers substantially below the representation of Blacks and Hispanics in the Boston area. The order did not prohibit the layoff of any minority personnel; in fact, under the

modified reduction in force plan, 13% of those laid off were Black or Hispanic police and fire officers. Boston Chapter, NAACP, supra, 679 F.2d at 977, n. 14. The modification ordered by the district court was a plan to ensure that effects of unlawful employment discrimination would not be allowed to reassert themselves. The plan was a reasoned response to a problem of serious consequence to the Boston community and was designed within the limits of the Constitution to ensure that the problem was dealt with in as effective and fair a manner as possible given the competing interests involved.

The position taken by the Solicitor General, in his brief amicus curiae in support of petitioners, that constructive seniority relief is available only to identified victims of impermissible discrimination limits too narrowly the powers of federal courts and this Court's ruling in Franks v. Bowman, supra. Such a limitation

would effectively deny relief to all individuals in this case and other employment discrimination cases where identification of victims is made difficult or impossible by passage of time, loss or destruction of records, or other reasons not within the control of persons subjected to discrimination. In circumstances where there is a long history of discrimination by an employer, large numbers of individuals who are qualified for employment never apply for jobs where they know it would be a futile effort. These individuals, although not identifiable, are nevertheless clear victims of a pattern of discrimination such as that which existed in the Boston Police and Fire Departments. The denial of relief to all but the very limited class of persons identified in Franks v. Bowman would make relief under Title VII illusionary, in contravention of the underlying purpose of the statute.

III.

CONCLUSION

For the foregoing reasons, the opinion of the First Circuit Court of Appeals below should be affirmed.

Respectfully submitted,

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